

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF TEXAS

3 TYLER DIVISION

4 CORE WIRELESS LICENSING, ) (

5 S.A.R.L. ) ( CIVIL DOCKET NO.

6 ) ( 6:12-CV-100-JRG

7 VS. ) ( MARSHALL, TEXAS

8 ) (

9 APPLE INC. ) ( JULY 6, 2015

10 ) ( 1:31 P.M.

11 MOTIONS HEARING

12 BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP

13 UNITED STATES DISTRICT JUDGE

14  
15 APPEARANCES:

16 FOR THE PLAINTIFF: (See sign-in sheets docketed in  
17 minutes of this hearing.)

18 FOR THE DEFENDANT: (See sign-in sheets docketed in  
19 minutes of this hearing.)

20 COURT REPORTER: Shelly Holmes, CSR-TCRR  
21 Official Reporter  
22 United States District Court  
23 Eastern District of Texas  
24 Marshall Division  
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25 (Proceedings recorded by mechanical stenography, transcript  
produced on a CAT system.)

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Be seated, please.

3 All right. This is the time set for argument of  
4 post-trial motions in the Core Wireless versus Apple case.  
5 This is Civil Action 6:12-CV-100.

6 The Court will call for announcements. What says the  
7 Plaintiff, Core Wireless?

8 MR. HILL: Good afternoon, Your Honor. Wesley Hill,  
9 Henry Bunsow, and John Ward on behalf of the Plaintiff, Core  
10 Wireless. We also have with us, Your Honor, our client  
11 representative, Mr. Scott Burt, for the record. We're ready.

12 THE COURT: All right. What says the Defendant?

13 MS. SMITH: Good afternoon, Your Honor. Melissa Smith  
14 on behalf of Apple. I'm joined today by Mr. David Prichard,  
15 Ms. Cindy Vreeland, Mr. Joe Mueller, Mr. Chip O'Neill, and also  
16 in-house for Apple, Mr. Andy Song. And, Your Honor, we're  
17 ready to proceed.

18 THE COURT: Thank you, Ms. Smith.

19 All right. Counsel, we'll start with Core Wireless's  
20 motions for JMOL regarding non-infringement. Coupled with that  
21 is Core Wireless's motion for new trial on the '321 and '850  
22 patents. I don't see any reason we can't -- the Court can't  
23 hear argument on both of those at the same time. So I'll hear  
24 from the moving Plaintiff when you're ready.

25 MR. BUNSOW: Thank you, Your Honor.

1           Your Honor, I have prepared some slides to help with  
2 the argument today. Those have been sent up to the bench.

3           THE COURT: I have them.

4           MR. BUNSOW: There are basically four motions being  
5 brought by Core Wireless, a motion for judgment as a matter of  
6 law that the '143 asserted claims are infringed, motion for  
7 judgment as a matter of law that the '022 and '664 asserted  
8 claims are infringed, motion for new trial on infringement of  
9 the '321, and motion for new trial on infringement of the '850  
10 patent.

11           And if it please the Court, I'll take those in order.

12           The first deals with the '143 patent. Apple's only  
13 defense to infringement was that the channel selection portion  
14 of the claims of the '143 patent must take place in the handset  
15 using a dedicated channel. That was the argument that Apple  
16 made to the jury, and that was also an argument that was  
17 explicitly rejected during the Markman process.

18           There is no requirement that the channel selection  
19 actually occur at all in Claim 17 and 21, and there is no  
20 requirement that the channel selection allocate a dedicated  
21 channel at all.

22           There are two modes of operation in these devices.  
23 One of them uses a random access channel when the volume -- the  
24 traffic is below a certain amount. When it reaches a certain  
25 amount, a request is generated. And that is as far as Claims

1 17 and 21 go.

2           There is no need that a selection actually take place  
3 or that a dedicated channel is actually assigned, much less  
4 that the dedicated channel must be assigned by the handset,  
5 which was the crux of Apple's defense in this case.

6           Apple violated the claim construction as a matter of  
7 law by arguing that channel selection must take place in the  
8 handset using a dedicated channel. That's the basis upon which  
9 the jury found non-infringement. That's the only basis upon  
10 which they could have found non-infringement.

11           Core Wireless's evidence of infringement, on the other  
12 hand, followed the claim construction and fully supported a  
13 finding of infringement absent the misleading arguments that  
14 were presented.

15           And in addition, it was conceded and not disputed that  
16 the accused products transmit on a common channel known as the  
17 RACH, R-A-C-H, random access channel, if the traffic was below  
18 a certain threshold. That is covered by Claims 17 and 21 and  
19 is an infringing mode of operation.

20           The important thing to realize about Claims 17 and 21  
21 is that infringement occurs upon the request, not upon a  
22 decision being made, not upon the assignment of a dedicated  
23 channel.

24           Claim 18 is the claim that deals with the actual  
25 assignment of a dedicated channel, not Claims 17 and 21.

1 Apple's expert did not contest that the request is  
2 generated and occurs in the accused products. And for those  
3 reasons, we move for judgment as a matter of law on  
4 infringement of the '143 patent.

5 Unless the Court has questions, I'll move to the next.

6 THE COURT: Let's -- let's move to the next.

7 MR. BUNSOW: The '022 and the '664 patents, you'll  
8 remember that these patents deal with a parameter called B-E-P,  
9 underscore, period2 or BEP\_period2.

10 Apple's own expert conceded infringement. We cover  
11 that on our brief at Pages 15 and 16, because the Apple devices  
12 follow the relevant standard. The devices are configured to  
13 capable of receiving the indication of signal quality.

14 The Claim that we asserted for infringement of the  
15 '022 and '664 patents is an apparatus claim. All the apparatus  
16 has to do to infringe is be considered -- be configured to  
17 receive the BEP\_period2 parameter which they are. The fact  
18 that they do or don't do anything upon receipt is irrelevant.  
19 The products are configured to receive it. It is a requirement  
20 of the standard, which is why they are configured to receive  
21 it.

22 And the testimony was that this is a measure of signal  
23 quality that while not implemented yet in the networks is  
24 available and able to be implemented and likely will be  
25 implemented.

1 Apple's semantic argument about finite is not infinite  
2 was not supported in the claims or in the claim construction.  
3 Again, it was a way to mislead the jury. Given admitted use of  
4 what was called a forgetting factor by the Apple devices, there  
5 is no difference at all.

6 The file history makes clear that the specification  
7 defines the filter. The filter is one that uses a forgetting  
8 factor, and that is exactly how the Apple's -- the Apple  
9 accused products work.

10 In the real world, that's how they work, and there is  
11 no difference. Infringement exists in the Apple accused  
12 products because these claims are apparatus claims. And we  
13 move for judgment as a matter of law finding infringement of  
14 the '022 and the '664 patents.

15 The next is our motion for new trial on the '321  
16 patent, and this revolves around the testimony that Dr. Stark  
17 gave concerning what's called the R99 voice mode of operation.

18 Dr. Stark had expressed no opinions in his expert  
19 report or in his deposition, and, in fact, he stated in his  
20 deposition that we played at trial that he had no opinion on  
21 whether or not the claims were infringed in the R99 voice mode  
22 of operation.

23 The Court will recall, I'm sure, that the R99 voice  
24 mode is the legacy mode of operation that must be available in  
25 the base stations in order for legacy devices, prior devices to

1 operate. So it is available. It is in the Apple accused  
2 products. It is operative.

3 We asked Dr. Stark: So you have no opinion whether or  
4 not the accused products meet the two-channel limitation in the  
5 voice mode, do you?

6 Answer: I didn't express an opinion on that, correct.

7 Question: No opinion, right?

8 Answer: Correct.

9 This was a point that we made to the jury, that  
10 basically Apple had put up an expert who had no opinion on a  
11 particular mode of infringing operation.

12 In response during closing argument, counsel put up an  
13 excerpt from his expert report, an expert report that was not  
14 in evidence and was not admissible into evidence, and then  
15 quoted a misleading quote about Dr. Stark's opinion of  
16 Mr. Chandler's expert report. It did not meet the issue that  
17 we had extracted from Dr. Stark on cross-examination. But it  
18 did give the jury the impression that I had misled them, that  
19 indeed Dr. Stark did have an opinion on the R99 mode, and  
20 obviously, they found non-infringement, we believe, at least in  
21 part on that basis.

22 That misleading argument, we believe, was prejudicial  
23 to the jury, and we would ask for a new trial on infringement  
24 of the '321 patent as a result.

25 THE COURT: Despite the fact that you say Apple's



1 expert was short-handed, if you will, in coming forward with  
2 opinions and evidence, clearly, as the Plaintiff, you bear the  
3 burden of proof on each and every element. And at this stage,  
4 the showing to the Court would have to be that no reasonable  
5 jury could have concluded other than you met each and every  
6 element of the asserted claims.

7           That's a pretty high burden, Mr. Bunsow. Other  
8 than -- other than casting aspersions at Apple's expert, what  
9 else have you got to show me that no reasonable jury could have  
10 reached any other conclusion but that each and every element  
11 has been met and the claim's been infringed?

12           MR. BUNSOW: Your Honor, our -- Your Honor, it is a  
13 high burden. What we have is the testimony of the -- the Core  
14 Wireless expert that went through the analysis as to the R99  
15 mode and confirmed that the claims did cover that mode. And we  
16 have the standard, which is admittedly adopted by Apple, which  
17 practices the R99 mode. So you put those two together, and you  
18 have their expert that gives an opinion that he has no opinion  
19 on the R99 mode, and the result is that the only -- the only  
20 evidence in front of the jury is that the R99 mode would  
21 infringe.

22           THE COURT: All right. What else do you have for me  
23 on this?

24           MR. BUNSOW: I have nothing else on the '321 patent,  
25 Your Honor.

1 THE COURT: All right. Let's move on to the next.

2 MR. BUNSOW: On the '850 patent, the basis for Apple's  
3 non-infringement was a mode of operation that was not accused  
4 of infringement, the so-called continuous mode.

5 If you remember in our presentation, there were two  
6 modes of operation. There was what we called the daylight mode  
7 and the nighttime mode. The whole purpose of the '850 patent  
8 was to accommodate nighttime traffic -- in other words, the  
9 paucity of traffic, very low-level traffic.

10 Apple's expert opined on the continuous mode, which  
11 was not the DRX mode of operation that we accused of  
12 infringement. The difference basically is day and night, the  
13 difference between the invention and a simple method of  
14 operation during normal operating conditions.

15 So we believe that there was no evidence of  
16 non-infringement presented by Apple, and there was ample  
17 evidence of infringement in the DRX mode, the -- the lower  
18 traffic mode from which the jury should have found  
19 infringement. There simply was no countervailing evidence  
20 presented to the jury on the DRX mode of operation.

21 THE COURT: Is it not possible that though you say  
22 there was no countervailing evidence to the contrary, it's  
23 clearly within the jury's purview to believe or disbelieve, to  
24 give weight to or give no weight to the testimony of your  
25 witnesses, and should the jury have chosen within its rightful

1 parameters to have afforded no weight or no credence to one of  
2 your witnesses, even without offering anything, you don't make  
3 your burden of proof and the Defendant still prevails?

4 So I understand your argument about nothing to the  
5 contrary. I understand your argument about the only evidence  
6 before the jury is on my side. How do I get over the hurdle of  
7 they might not have believed your side?

8 MR. BUNSOW: I think that the hurdle must be overcome  
9 by some showing of a basis for the jury to disregard that  
10 testimony. When the record evidence is wholly on one side  
11 without any contrary evidence whatsoever, there would have to  
12 be a substantial showing that -- that the jury would be  
13 justified in disregarding the only evidence before them.

14 And I haven't seen that in the briefing. I haven't  
15 seen anything presented by Apple that could support a  
16 reasonable -- reasonable juror in disregarding the only  
17 testimony of record in the case.

18 THE COURT: All right, sir. What else?

19 MR. BUNSOW: That's all I have, Your Honor.

20 THE COURT: Okay. Let me have a response from the  
21 Defendant.

22 MR. MUELLER: Good afternoon, Your Honor. Joe  
23 Mueller. May I proceed?

24 THE COURT: You may.

25 MR. MUELLER: Ms. Vreeland will address the '321 and

1 '850 issues --

2 THE COURT: All right.

3 MR. MUELLER: -- with Your Honor's permission.

4 THE COURT: Okay.

5 MR. MUELLER: On the '143 patent, Your Honor, five  
6 points.

7 First, these claims at issue provide the context, are  
8 directed to a system in which the mobile makes a decision  
9 between using a dedicated and a common channel.

10 And if Your Honor will recall at trial, Core Wireless  
11 took the position that this patent, along with the others, had  
12 been incorporated into the standard. This was the one where a  
13 proposal had been made to ETSI by the inventor, and Core  
14 Wireless's expert, Dr. Olivier, conceded that proposal had been  
15 rejected. That's the backdrop for the claims.

16 The particular claims at issue have two  
17 means-plus-function limitations. One is a means for sending,  
18 and one is a means for comparing. Both were construed by Judge  
19 Love. Both were reviewed by Judge Davis. And both Judge Davis  
20 and Judge Love concluded that the corresponding structure for  
21 those claims included various parts of the control unit within  
22 the mobile device. That's the control unit 803, according to  
23 the patent specification.

24 The description in the specification with respect to  
25 how that control unit works explicitly states in a passage that

1 the Court adopted in the construction that it advantageously  
2 performs channel selection. And I would note, Your Honor, that  
3 that was also a section of the specification that Core Wireless  
4 proposed as part of the means for sending construction and did  
5 not object to when Magistrate Judge Love adopted that language  
6 as part of his claim construction and Judge Davis approved  
7 that, as well.

8           So we have a corresponding structure that involves  
9 channel selection and is bound up in the means for comparing  
10 and the means for sending. And there's really no dispute at  
11 all at trial that the mobile unit does not do that. The  
12 control unit within the mobile unit does not do that. The  
13 decision is made the network side of the larger cellular system  
14 so that channel selection requirement that was in both the  
15 means for sending corresponding structure and the means for  
16 comparing corresponding structure is not met.

17           Moreover, there was another second -- a second  
18 non-infringement defense that we offered at trial, and the jury  
19 was entitled to credit. And that is that the means for  
20 comparing limitation was not satisfied because the alleged way  
21 in which the Apple products were satisfying that limitation did  
22 not relate to channel selection.

23           The claim language is means for comparing four bases  
24 of said channel selection, and the proof that was offered by  
25 the Plaintiff was a measurement report. And the evidence was

1 clear at trial that measurement report can be used for multiple  
2 potential purposes by the network, and it wasn't necessarily  
3 being used for channel selection.

4           So the bottom line is we have multiple ways in which  
5 the claim language was construed to require particular  
6 structure, two different ways in which the jury could have  
7 decided that it was not being met in the Apple products. And  
8 this really has no basis to -- to conclude that every  
9 reasonable juror would conclude both of those defenses lacked  
10 merit. A reasonable juror can conclude that at least one, if  
11 not both of those defenses, sufficed to find non-infringement  
12 of the '143.

13           And with Your Honor's permission, I'll move on to the  
14 '022 and '664.

15           THE COURT: That's fine.

16           MR. MUELLER: With the '022 and the '664, there were  
17 two defense that we offered at trial. The first was the claims  
18 explicitly required a finite length filter, and the undisputed  
19 proof, including from the Plaintiff's own expert, was what --  
20 that the accused filter functionality was mathematically  
21 infinite. And so the argument that was made was  
22 notwithstanding it being mathematically infinite, it somehow  
23 could satisfy a finite length filter.

24           Well, Dr. Stark disagreed, and certainly the jury was  
25 entitled to decide that dispute against Core Wireless, the

1 plain language of the claim said finite length filter and the  
2 undisputed evidence that it was mathematically infinite.

3 So from that ground alone, the jury could properly  
4 conclude that there was no infringement.

5 There was a second ground, though, as well, and that's  
6 the claims required an indication of signal quality. And with  
7 respect to that, the accused functionality was a parameter  
8 called BEP\_period2. And it was conceded that BEP\_period2 was  
9 not actually sent, or at least there was no evidence of it  
10 being sent. I think Mr. Bunsow admitted as much just now.

11 So the argument was that the products are capable of  
12 using it. Well, there's two responses to that. First, it has  
13 never been sent, and there's no evidence that it will be sent.  
14 It's at least a fact question as to whether that satisfies a  
15 capable of requirement.

16 Second, there was not sufficient evidence that even if  
17 it were sent, it was an indication of signal quality. And, in  
18 fact, Dr. Stark testified he'd seen no evidence it was, and the  
19 Plaintiff's own expert offered no evidence that it was being  
20 used as an indication of signal quality.

21 So as with the '143, for the '022 and '664, we have  
22 two independent grounds for non-infringement, each of which a  
23 reasonable juror could have concluded sufficed to find  
24 non-infringement of those two patents.

25 THE COURT: All right.

1 MR. MUELLER: Thank you, Your Honor.

2 THE COURT: Thank you.

3 Ms. Vreeland?

4 MS. VREELAND: Thank you, Your Honor.

5 I'd like to start with the '321, and we think there  
6 are three strong reasons to deny the motion with respect to the  
7 '321.

8 And the first is that these arguments have been  
9 waived. And this is quite significant here. There's a -- the  
10 basis of the complaint is this statement in the closing that  
11 Mr. Mueller made that -- that there had -- that -- to respond  
12 to the suggestion in Core Wireless's closing that -- that  
13 Dr. Stark had offered no opinion on this key issue.

14 And, in fact, the very same part of the report that  
15 was shown in the closing was also shown in Dr. Stark's redirect  
16 when the same issue was raised during his testimony. So we  
17 have a situation here where not only was a claim of error  
18 waived, but it was waived twice.

19 If Core Wireless thought there was something wrong  
20 about the use of that part of the report to rehabilitate during  
21 Dr. Stark's testimony, then it should have and was required to  
22 raise an objection. It should have raised during that redirect  
23 testimony that the claimed use of the report was -- was hearsay  
24 and that it should not be permitted. But they waived it twice.  
25 They didn't object during the testimony, and they didn't object



1 during the closing.

2           So we think first, it's been waived. And we think  
3 secondly, that Apple's use of that part of Dr. Stark's earlier  
4 report was entirely proper under Federal Rule of Evidence 801,  
5 which is the hearsay rule. As Your Honor knows, a prior  
6 consistent statement is entirely admissible to rehabilitate a  
7 witness's testimony, and that was exactly the use of this part  
8 of the report.

9           And as Your Honor will recall, the -- one of the  
10 primary disputes for this patent was whether Apple's products  
11 ever transmitted over exactly two channels. And this was a  
12 significant issue because the part of the standard that Core  
13 Wireless was relying on, as you'll recall, was a part of the  
14 standard that was only in effect for six months during a  
15 six-month period in 1999, eight years before Apple even  
16 introduced the iPhone.

17           So on his direct testimony, Dr. Stark testified that  
18 he had seen no evidence that Apple's products ever used that  
19 very old part of the code that was in effect for six months in  
20 1999.

21           During cross-examination, his testimony was impeached.  
22 He was impeached on the -- on the grounds that in his  
23 deposition he had said that he had no opinion on the issue.  
24 And so it was -- once there was a suggestion made that  
25 Dr. Stark had no opinion on this issue, it was entirely proper

1 to rehabilitate that testimony with the prior inconsistent --  
2 the prior consistent statement in his report. He said in his  
3 report the very same thing he said on direct, that he had seen  
4 not -- no evidence that Apple's accused products ever used that  
5 very old part of the standard in effect for six months.

6           So we have a situation here, we think, where what's  
7 complained about was entirely proper. It was a prior art  
8 consistent statement, admissible under Rule 801. It was not  
9 objected to when it came in during the redirect. It was not  
10 objected to when it was referred again in the closing.

11           And finally, we just underscore that we think that  
12 even if Core Wireless could prove an error, and we don't think  
13 they can because of the waiver and because of the proper use of  
14 the statement, but even if they could show an error, there's no  
15 way that that rose to the level of prejudice that would be  
16 required for a new trial. This was one statement in a  
17 40-minute closing. It was -- Your Honor instructed the jury  
18 that closing arguments were not evidence.

19           And I think most telling of all is the fact that in  
20 its reply brief on this issue, Core Wireless concedes that  
21 Apple could have used Stark's testimony, rather than reshowing  
22 his report. And, of course, there can really be no difference  
23 between testimony and a report that said the same thing.

24           And, Your Honor, we'd also underscore that this was  
25 but one of multiple issues. There were three -- Dr. Stark gave

1 three reasons why this patent was not infringed. He -- he  
2 testified that Apple's products didn't use the exactly two  
3 channels that was required by the claims. He explained that  
4 Apple's products didn't use the two spreading codes required by  
5 the claims. He required -- he explained that Apple's products  
6 didn't change power levels as required by the claims.

7 So this was one statement in a closing related to one  
8 of multiple issues, and we think clearly waived.

9 And I would move on to the '850, unless Your Honor has  
10 any questions?

11 THE COURT: Go ahead, move to the '850.

12 MS. VREELAND: And on the '850, Your Honor, we think  
13 that here, Dr. Knightly's evidence strongly supported the  
14 jury's finding of non-infringement.

15 Core Wireless said in its briefs and it said here  
16 again, it's made the claim that Apple only showed evidence  
17 of non-infringement in continue -- what Core Wireless has  
18 called the continuous mode of operation. And they repeatedly  
19 claimed that Apple produced no evidence of non-infringement  
20 in this dis -- what they call the discontinuous mode of  
21 operation.

22 And Your Honor may remember references to something  
23 called the MAC inactivity threshold timer at trial. Core  
24 Wireless's theory at trial was after that timer expires, then  
25 the products go into something that Core Wireless called

1 discontinuous mode. And they claim that there was infringement  
2 in this discontinuous mode.

3 But there was strong evidence from Dr. -- Dr. Knightly  
4 that that was not the case. And I would refer Your Honor for  
5 example, to Dr. Knightly's testimony on March 13th, on Page 36.  
6 He was asked about exactly this situation where Core Wireless  
7 claims that there's infringement, the situation where the MAC  
8 inactivity timer has expired. And he explained how in that  
9 situation, the products wouldn't infringe.

10 So there was strong testimony from Dr. Knightly  
11 supporting the jury's conclusion of no infringement, both in a  
12 situation when the products are in what Core Wireless calls  
13 continuous mode and when the products are in what Core Wireless  
14 has called discontinuous mode.

15 And, in fact, he offered multiple grounds for that  
16 conclusion. As you may remember, there were three key parts of  
17 the claims. You've got to determine one of these virtual TTIs,  
18 you've got to check to see if there's a transmission in a  
19 current TTI, and then there's a conditional step, if there's no  
20 transmission, you've got to impose a waiting associated with  
21 the virtual TTI. And Dr. Knightly explained how those steps  
22 are not met by the products. So there were multiple grounds  
23 for the conclusion of non-infringement by the jury.

24 THE COURT: Thank you.

25 MS. VREELAND: Thank you.

1 THE COURT: Mr. Bunsow, do you have anything else --  
2 anything else to add before we move on?

3 MR. BUNSOW: I do, Your Honor, briefly.

4 As to the '143, the problem was stated again by  
5 Mr. Mueller, respectfully, when he said -- and I wrote it  
6 down -- the decision is in the handset.

7 If you look at Claim 17 and 21, the decision is not in  
8 the handset. It is not required in the handset at all. And  
9 yet that was their basis for non-infringement. All that has to  
10 happen in the handset is that a request is generated, and the  
11 claim language is specifically the following: A request is  
12 generated for basis of channel selection. There is no actual  
13 channel selection in the handset.

14 And that argument is wrong, and that's the argument  
15 that was used with the jury in order to support  
16 non-infringement.

17 On the '022 and the '664, BEP\_period2 is in the  
18 standard. It is required that the products be configured in  
19 order to receive that parameter. There is no dispute about  
20 that. There was no dispute about that. Apple's witness  
21 admitted that. Our witness proved it. Compliance requires it.

22 So since the '022 and '664 patent claims are apparatus  
23 claims and the accused products are configured to receive that  
24 parameter, there is infringement.

25 On the '321, we're not talking about rehabilitation

1 here of anything. Dr. Stark said in his deposition and in  
2 direct testimony that he had no infringement -- or he had no  
3 opinion on whether the R99 mode infringes. What they offered  
4 from his expert report is that he did not believe Mr. Chandler  
5 had proven infringement. Those are two totally separate  
6 considerations. This wasn't a situation of rehabilitation at  
7 all, although it was presented as that, and certainly they  
8 attempted to use it as that.

9 THE COURT: Aren't you asking me to grant a new trial  
10 there based on attorney argument during closing?

11 MR. BUNSOW: Based on attorney argument in part, but  
12 also based on the display to the jury of a document that was  
13 not admitted into evidence and a mischaracterization of that  
14 document. Obviously, displaying the document carries a lot  
15 greater weight than the attorney simply saying it.

16 THE COURT: What's -- what's your response to  
17 Defendant's argument that there was no objection raised, and,  
18 therefore, that was waived?

19 MR. BUNSOW: It wasn't waived because the document was  
20 never offered into evidence. We obviously would have objected  
21 to it if it was offered into evidence. Your Honor's  
22 instructions were very clear that to the extent that there was  
23 anything -- anything in the closing arguments that might be  
24 controversial, that was to be brought up in advance. This  
25 wasn't. Had it been brought up in advance, obviously, we would

1 have dealt with it, but it wasn't.

2 And so I don't believe there was any waiver here.

3 THE COURT: Anything else, Mr. Bunsow?

4 MR. BUNSOW: No, Your Honor, that's it.

5 THE COURT: Okay. Thank you.

6 MR. BUNSOW: Thank you.

7 THE COURT: All right. Any additional reply from  
8 Defendant?

9 MR. MUELLER: No, Your Honor.

10 THE COURT: All right. Then let's move on to Apple's  
11 motion for JMOL of invalidity, or in the alternative for a new  
12 trial on invalidity.

13 MR. MUELLER: Thank you, Your Honor. Just briefly on  
14 this, I think we'll primarily rest on our papers, but this is a  
15 conditional request. To the extent that the jury verdict of  
16 non-infringement is left undisturbed, then our motion is moot.

17 THE COURT: I understand.

18 MR. MUELLER: And we believe that only in that  
19 circumstance where it were disturbed, that the logic that would  
20 require disturbing it would also invalidate the claims because  
21 we believe we demonstrated at trial that for each of the  
22 patents-in-suit, to the extent the accused functionality were  
23 covered by the claims, there was prior art that would equally  
24 cover the claims under the same theory.

25 And so we'll rest on our papers in terms of how that

1 was accomplished. I'm happy to answer any questions Your Honor  
2 has --

3 THE COURT: No.

4 MR. MUELLER: -- but otherwise it's really a  
5 conditional motion.

6 THE COURT: So said another way, if Mr. Bunsow gets a  
7 new trial on infringement, you want a new trial on in -- on  
8 validity?

9 MR. MUELLER: Correct. Thank you, Your Honor.

10 THE COURT: All right. Mr. Bunsow, do you have  
11 anything on this motion?

12 MR. BUNSOW: I do, Your Honor.

13 We have taken the time to go through the bases for  
14 invalidity, and basically the showing at trial would not  
15 support an invalidity finding in this case. We briefed that.  
16 I'd be glad to articulate our arguments in that respect, but  
17 fundamentally, the invalidity position for the '143 patent is  
18 insufficient to prove invalidity by clear and convincing  
19 evidence. It's -- it's really as simple as that.

20 THE COURT: All right.

21 MR. BUNSOW: And we've detailed that argument in our  
22 briefing, as well.

23 THE COURT: All right. Thank you.

24 Okay. I'll next hear argument on Apple's motion to  
25 lift the stay and dismissal and/or summary judgment on the



1 portfolio contract and the unjust enrichment claims.

2 MR. MUELLER: Thank you, Your Honor.

3 As context, these claims were heard in part at trial  
4 and decided by Your Honor, but I'll -- if I could, I'll go back  
5 before trial.

6 THE COURT: Yeah, we're talking about the claims that  
7 were not heard at trial that were stayed by Judge Love,  
8 correct?

9 MR. MUELLER: Correct. But importantly, Your Honor,  
10 the same contract theory underlies the ones that were heard at  
11 trial. So if I could back up to the pre-trial proceedings to  
12 put these in context.

13 Midway through discovery, Core Wireless amended their  
14 pleadings to add these claims, and they added contract claims  
15 and unjust enrichment claims based on the theory, if I could  
16 summarize it, that Apple had an obligation to either negotiate  
17 to take a license, or to actually take a license to the Core  
18 Wireless patents, both the full portfolio and the  
19 patents-in-suit, by virtue of Core Wireless and Nokia having  
20 declared those patents to be standard essential.

21 And based on that premise, there was breach of  
22 contract arguments, as well as unjust enrichment arguments with  
23 the latter based on the theory that Apple was being unjust --  
24 unjustly enriched by its use of the patents without engaging in  
25 negotiations and taking a license. That, I think, is a fair

1 characterization of the thrust of the -- the theories.

2 Judge Love decided before the trial to stay the  
3 portfolio claims and to stay the unjust enrichment claims in  
4 their entirety. And he did so in response to a motion to  
5 dismiss that we had brought in which we argued there is simply  
6 no basis for the contract at issue in this case, and there's  
7 multiple problems with the unjust enrichment claims, including  
8 that they're preempted by the Patent Act.

9 And, again, Judge Love, in response to that motion,  
10 stayed the portfolio claims and stayed the unjust enrichment  
11 claims in their entirety. And what proceeded to trial was the  
12 contract claims as applied to the five patents that went to  
13 trial before Your Honor. And Your Honor, after hearing all the  
14 evidence at trial, and they had a full and fair opportunity to  
15 present their view of that contract, concluded there was no  
16 contract sufficient to go to the jury.

17 And, in fact, there really is no contract. There was  
18 never an agreement between Apple and anyone, but in particular,  
19 Core Wireless, to pay them under a license or to negotiate a  
20 license to patents simply because Nokia had declared these  
21 patents as essential.

22 And I think the case has demonstrated one of the  
23 reasons why that theory never really made a lot of sense  
24 because the theory would require a -- a product supplier to go  
25 take a license or to negotiate a license just because a

1 patentholder said itself that its patents were essential.

2           The -- the first time that a decisionmaker -- a  
3 third-party decisionmaker conclusively decided one way or the  
4 other if these patents were essential were in this case where  
5 the jury, subject to Your Honor's review, decided they were not  
6 essential and not infringed.

7           So it wouldn't make a lot of sense to agree to pay  
8 someone just because they said to you their patents are  
9 essential without any gatekeeper verifying that statement or  
10 any third party testing it. So there really was no contract.  
11 The evidence at trial demonstrated there was no contract, and  
12 we believe Your Honor properly refused to send that claim to  
13 the jury.

14           The portfolio claims, which have been stayed, are  
15 based on exactly the same theory, exactly the same theory.

16           THE COURT: Let me ask you this, Mr. Mueller. For  
17 purposes of argument, assume that you're exactly right, that  
18 the stayed claims or portfolio claims are based on the same  
19 theory, does the fact that they're based on the same theory  
20 mean that I should grant judgment against the Plaintiff without  
21 them having their day in court, without them being able to  
22 present evidence? I mean, how does -- how does the  
23 adjudication of the claims that were tried in and of itself  
24 dispose of claims that were stayed and by the nature of being  
25 stayed were precluded from going through the dispositive trial

1 process?

2 MR. MUELLER: Yes, Your Honor, for three reasons.

3 The first is the contract that's been alleged for the  
4 portfolio is precisely the same contract that was alleged for  
5 the five patents-in-suit, precisely the same contract. And  
6 they had a chance to prove up that contract at trial and  
7 didn't.

8 I'd also note, Your Honor, they did not move in  
9 post-trial proceedings to alter Your Honor's decision to not  
10 send that claim to the jury. There's been no request for  
11 post-trial relief on that.

12 And, in fact, this morning we were before Judge Love  
13 on very similar issues.

14 THE COURT: So I understand.

15 MR. MUELLER: And Mr. Bunsow, I believe, stated to  
16 Judge Love that judgment should properly enter for Apple on  
17 those contract claims in light of the failure to move.

18 The failure to move on those claims and Your Honor's  
19 decision on those claims was predicated on precisely the same  
20 contract. And if it doesn't exist for the five, it doesn't  
21 exist for the 1,200. There's never been any showing by Core  
22 Wireless that there's some other contract that would apply to  
23 the portfolio that didn't apply to the five.

24 And the third point, Your Honor, is if there had been  
25 a contract, if there had been a contract, Your Honor could

1 properly conclude that the application of that contract to the  
2 1,200 patents has not yet been the subject of discovery in  
3 trial. We agree.

4 But the threshold question is, is there a contract?  
5 And on that threshold question, there is none. It's exactly  
6 the same theory for both the five and the portfolio. They had  
7 a full and fair opportunity to prove up that claim, didn't do  
8 so, and have not moved for any form of post-trial relief.

9 And so we believe judgment, as it enters against the  
10 five, will foreclose the portfolio, as well, because there's  
11 never been any suggestion whatsoever that there would be a  
12 different separate contract applicable to that larger  
13 portfolio.

14 THE COURT: So you're saying that judgment on the five  
15 that were not stayed is based on there being no contract -- no  
16 underlying contract at all, therefore, whether it's those five  
17 or the remainders of the portfolio that were stayed, the result  
18 is the same?

19 MR. MUELLER: That's --

20 THE COURT: Is that your argument?

21 MR. MUELLER: As we understand Your Honor's order,  
22 that's exactly what we think happened at trial, and we believe  
23 the logical implication of that would be to foreclose the  
24 portfolio claim. And, again, that decision has not been the  
25 subject of any post-trial relief. And we think it does

1 foreclose the larger portfolio.

2 If they had prevailed on that claim at trial, there  
3 would be a further question as to how do you apply that  
4 contract to the 1,200. But if there is no contract for the  
5 five, there can't be any contract for the 1,200.

6 THE COURT: All right.

7 MR. MUELLER: On --

8 THE COURT: Go ahead.

9 MR. MUELLER: -- on unjust enrichment, Your Honor,  
10 we've briefed the issues, but there's multiple problems,  
11 including the -- the real premise of the claim is that Apple is  
12 being unjustly enriched by virtue of using patents, but that's  
13 a patent infringement claim under a different label, and it's  
14 preempted.

15 There's also additional problems, as well, but we'll  
16 rest on our papers with respect to those.

17 THE COURT: All right. Mr. Bunsow?

18 MR. BUNSOW: Thank you, Your Honor.

19 First, I think it's important to understand what the  
20 contract is for the portfolio claims for the stayed claims and  
21 how that impacts both the contract claims and the unjust  
22 enrichment claims.

23 Basically, there are 1,200 patents that were declared  
24 essential to ETSI.

25 Now, counsel just said that the five patents-in-suit

1 were found not infringed, and, therefore, there was no  
2 obligation to take a license to those five patents. And on the  
3 state of the record, that is true. To the extent that patents  
4 are not infringed, there is no obligation to take a license.

5           However, the obligation that we're talking about  
6 actually starts many steps before that because if it was the  
7 intention of ETSI that an IPR holder like Nokia must prove  
8 infringement five patents at a time, nobody would live long  
9 enough to come to the end of that process. That is clearly not  
10 what the ETSI obligation is all about.

11           Section 6.1 of the ETSI regulations state that IPR  
12 holders who declare standard essential patents are entitled to  
13 fair compensation. Apple --

14           THE COURT: So let -- let me interrupt you a minute.

15           What you're telling me is that because there was no  
16 infringement, there was no breach of contract?

17           MR. BUNSOW: Yes.

18           THE COURT: And as to the remainder of the stayed  
19 patents, there's not been a determination of infringement or  
20 non-infringement, therefore, they're entitled to be litigated?

21           MR. BUNSOW: Yes.

22           THE COURT: How do you respond to Mr. Mueller's  
23 argument that it's not conditioned on infringement or  
24 non-infringement that there was no underlying contract, and if  
25 there's no underlying contract of part of the portfolio,

1 there's no underlying contract to all of the portfolio?

2 MR. BUNSOW: Well --

3 THE COURT: There's a -- there's a disconnect here  
4 somewhere.

5 MR. BUNSOW: There -- there is. And the -- the  
6 disconnect is what I described in the beginning, that you don't  
7 negotiate under the ETSI IPR rules five patents at a time.  
8 That's the whole point.

9 An IPR owner like Nokia with 1,200 patents commits  
10 those for license on the understanding that there will be good  
11 faith negotiation by a user like Apple for a license on fair,  
12 reasonable, and non-discriminatory terms.

13 The whole purpose is to avoid this piecemeal five  
14 patents at a time type of determination. So the -- the  
15 underlying obligation is a good faith negotiation vis-a-vis the  
16 companies on a broad basis, not on an individual  
17 patent-by-patent basis.

18 THE COURT: Let me ask --

19 MR. BUNSOW: Nokia would never ask that -- that Apple  
20 negotiate FRAND rates on one patent at a time.

21 THE COURT: Let me --

22 MR. BUNSOW: Now, Apple asked that.

23 THE COURT: -- let me ask you this --

24 MR. BUNSOW: Sorry.

25 THE COURT: -- let me ask you this.



1           If these remaining stayed claims were to be litigated,  
2 would you intend to submit substantially the same testimony in  
3 evidence in support of them, or are you telling me that having  
4 lost on these five, you'd go out and find other evidence, other  
5 witnesses, and other testimony? I mean, are we talking about  
6 the exercise of hearing the same things if these do survive,  
7 just to come to the same result, or is there something  
8 different out there that would come to trial, if there was a  
9 trial, on these stayed claims at a later date?

10           MR. BUNSOW: There -- some of the evidence,  
11 admittedly, is the same. Apple's actions, for example,  
12 would -- would likely be the same. But the presentation would  
13 include the value and derivation of the portfolio.

14           When we're talking about the portfolio, we're talking  
15 about something far more expansive and different than we're  
16 talking about in terms of the five claims.

17           THE COURT: And that -- that's a valid point. I'm not  
18 saying would the damages component be the same. I'm saying  
19 would the liability component be the same?

20           MR. BUNSOW: And I don't believe it would be the same,  
21 Your Honor, and the reason --

22           THE COURT: You do or you don't?

23           MR. BUNSOW: I don't believe it would be the same, and  
24 the reason it would not be the same is that the lia --  
25 liability component would include the -- the portfolio

1 evidence, and -- and not -- obviously portfolio from a quantity  
2 standpoint goes to damages, but it also goes to liability and  
3 whether Apple was reasonable in refusing to negotiate.

4           For example, Apple could have been very reasonable in  
5 refusing to negotiate for one, two, three, four, five patents,  
6 but when you have a company like Nokia with a decade's old  
7 history of developing these technologies and you have 1,200  
8 patents, that is a totally different consideration. We never  
9 were able to take discovery on Apple's view of the portfolio of  
10 Nokia or -- or Nokia's view of the portfolio for that matter.

11           But the reason that ETSI imposes this obligation is to  
12 avoid exactly what happened in this case and relieve the  
13 parties from the necessity of going through what we went  
14 through in this case.

15           So the evidence is different, and it certainly very  
16 easily and I believe would result in a different determination.  
17 And I would just point out that in this case, the -- the jury  
18 was asked to find whether Core Wireless, aka Nokia, had acted  
19 properly, and they found that we had acted properly.

20           The flip side of that that they didn't decide is that  
21 Apple did not act properly. So I think that would support the  
22 argument also that in the -- in the portfolio context, they  
23 could very easily come to a different conclusion.

24           THE COURT: All right. Thank you.

25           Mr. Mueller, anything else to add?

1 MR. BUNSOW: The unjust enrichment, may I address that  
2 briefly?

3 THE COURT: Yeah. That's my mistake. Let's go ahead  
4 and cover the unjust enrichment.

5 MR. BUNSOW: So on the unjust enrichment, the -- the  
6 benefit is that from 2009, when the first iPhone was released,  
7 Apple has been able to represent to networks, to users, to  
8 interchanges that these patents practice the standards.

9 THE COURT: How is your unjust enrichment claim  
10 anything other than a patent infringement claim in state law  
11 clothing? I mean, how is it anything different?

12 MR. BUNSOW: It is a benefit that they have received  
13 by the representation that they cover the standard. It is not  
14 a patent infringement claim.

15 By saying that they are authorized and able to comply  
16 with the standard, they have received certain benefits. That's  
17 irrelevant to whether or not they infringe the patents. It has  
18 nothing to do with the patents.

19 The fact of the matter is they should have been  
20 negotiating with Nokia at that time in order to make those type  
21 of representations. They were not. They chose to stonewall  
22 Core Wireless for over two years while they continued to make  
23 those representations. They continue to make them through  
24 today. So it's -- it's a different benefit. It's not centered  
25 in a patent infringement claim.

1 THE COURT: Well, I thought in your briefing you said  
2 it was based on the failure to pay?

3 MR. BUNSOW: Yes.

4 THE COURT: But now it sounds like you're telling me  
5 that it's some kind of a misrepresentation theory. So which --  
6 which is it?

7 MR. BUNSOW: It's both, Your Honor. It's both.

8 THE COURT: All right.

9 MR. BUNSOW: It's -- it's a failure to pay in order to  
10 properly make the representation.

11 THE COURT: Okay. Anything else on unjust enrichment?

12 MR. BUNSOW: No, Your Honor.

13 THE COURT: Let me hear from Apple in response on the  
14 stayed claims and anything else on unjust enrichment and then  
15 we'll move on.

16 MR. MUELLER: Thank you, Your Honor.

17 A few points on the stayed claims. The first is the  
18 premise of this set of claims from the beginning has been that  
19 it would be a way for Core Wireless to obtain a remedy without  
20 proof of infringement.

21 Now, I think there was a statement made just now that  
22 the claims failed because of non-infringement. That's not how  
23 we have understood those claims and how they've been presented.  
24 In fact, they've been consistently argued over the last two  
25 plus years as claims that don't require a merits showing on the

1 patents. That is to say the thrust of these claims is that  
2 once Nokia and Core Wireless declared the patents to be  
3 essential, Apple became obligated to take a license or to  
4 negotiate a license with Nokia and Core Wireless without proof  
5 of infringement and validity on the merits and an adjudication  
6 of such.

7 Our understanding of these claims from the beginning  
8 has been that they do not turn necessarily on patent judgments,  
9 in terms of infringement and validity, but instead that they  
10 are triggered -- these duties, according to the Plaintiff, are  
11 triggered by declaring a patent to be essential.

12 No Court has ever adopted that logic, no one. ETSI  
13 has never said that. No standards organization that I'm aware  
14 of has ever said that a contractual obligation arises by virtue  
15 of a patentholder itself unilaterally declaring patents as  
16 essential.

17 If you have a patent and you want a remedy on it, you  
18 have to prove your case in court. And nothing that ETSI has  
19 said, nothing that any Court has ever said changes that basic  
20 requirement of proof.

21 And there's a good common sense reason for it. You  
22 don't necessarily have to accept at face value what a  
23 patentholder says with respect to their patents. They may say  
24 to you these are important, these are essential, and you can  
25 have a discussion about that. If you choose to disbelieve the

1 patentholder and not to take a license, you're leaving yourself  
2 at risk. They could sue you for infringement, and that's the  
3 risk you take. But you're not obligated to accept at face  
4 value their representation.

5           And I think the suggestion is being made that how  
6 could you possibly put patentholders to the trouble of suing  
7 five at a time. Well, this case shows exactly why. They  
8 started out with 14 patents -- 14 patents in this case, and  
9 have prevailed on none.

10           And so if Apple had accepted at face value the  
11 representation made at the beginning, you need our 14 patents,  
12 they would be paying money for patents that they're not using.  
13 As time has gone on and the proof has come in, it's  
14 demonstrated that all 14 are not being used.

15           It's very good common sense reason why this contract  
16 would never exist, but it doesn't exist, and that's the  
17 important point.

18           The same contract theory underlies the five and the  
19 1,200. I don't think Mr. Bunsow suggested there be any new  
20 evidence on the contract. I think what he was saying, if I  
21 understood him correctly, is that the application of that  
22 theory to the 1,200 might be different if you were to allow the  
23 case to proceed.

24           But the threshold question is, is there a contract?  
25 Your Honor concluded after they were given a full and fair

1 opportunity to present that contract that there was none. And  
2 if there's no contract for the five, there's none for the 1,200  
3 either. And the claim fails necessarily because they were  
4 unable to prove that threshold question of the existence of a  
5 contract and have not moved for post-trial relief on Your  
6 Honor's determination that it was insufficient to send to the  
7 jury.

8           So for those reasons, we think the contract claims  
9 should be dismissed, and that would allow for final judgment in  
10 the case as a whole.

11           On unjust enrichment, the only thing I would add is  
12 this. The statement that Apple has advertised its products as  
13 supporting the standard without paying suggests that Core  
14 Wireless has a right to the standard. They don't. They don't  
15 own the standard. Nokia doesn't own the standard.

16           What they own are patents. And to the extent they can  
17 prove in court that those patents cover portions of the  
18 standard, they can request patent remedies for those patents.  
19 They've not been able to do so to date, but if they were ever  
20 able to do it, they could request a patent remedy.

21           Unjust enrichment law does not provide any opportunity  
22 to otherwise go after Apple for using the standard. The only  
23 rights they have are patent rights. And to the extent that  
24 they use unjust enrichment to go after the same conduct, it's  
25 preempted by the Patent Act.

1 THE COURT: All right.

2 MR. MUELLER: Thank you, Your Honor.

3 THE COURT: Anything else, Mr. Bunsow? Isn't unjust  
4 enrichment an equitable remedy --

5 MR. BUNSOW: It is, Your Honor.

6 THE COURT: -- if I remember that far back to law  
7 school?

8 MR. BUNSOW: Yes. Yes, it is.

9 THE COURT: And why would an equitable remedy prevail  
10 here when a legal remedy has been found to be absent or  
11 wanting? Are you telling me that there is no remedy at law  
12 here, and, therefore, equity should be invoked?

13 MR. BUNSOW: I believe that you can have both equity  
14 and legal remedies for different causes of action. So the  
15 legal remedy would be the breach of contract claim. The unjust  
16 enrichment claim really goes to a different set of facts and --  
17 and a different legal theory.

18 If I might, counsel said that you're not entitled to  
19 compensation until you prove validity and infringement, and  
20 that's certainly true in an arm's length situation. We're not  
21 talking about an arm's length situation. We're talking about  
22 people who have joined an organization called ETSI and who have  
23 committed -- committed to honor the obligations that ETSI  
24 imposes.

25 Section 6.1 specifically says that IPR holders are



1 entitled to fair, reasonable, and compen -- fair, reasonable,  
2 and non-discriminatory compensation for their intellectual  
3 property rights. There is an obligation by ETSI owners that  
4 use these standards that those IPR rights support to make that  
5 compensation. This is not an arm's length situation in the  
6 normal -- normal situation.

7 THE COURT: But, I mean, my experience has always been  
8 that unjust enrichment is asserted as an alternative theory to  
9 breach of contract, and either you say that the Defendant's  
10 breached our contract, and if for some reason there's a  
11 technical flaw that keeps the contract from being enforceable,  
12 then based on rules of equity, you're still entitled to recover  
13 because otherwise, the Defendants received an unjust  
14 enrichment.

15 Now, as to the five claims that went forward at trial,  
16 you alleged breach of contract, but to my knowledge, you never  
17 alleged unjust enrichment there.

18 MR. BUNSOW: I believe you're correct, Your Honor.

19 THE COURT: And yet you're wanting to -- so by --  
20 does -- does the fact that you failed to assert unjust  
21 enrichment in the alternative to your breach of contract  
22 theories as to those that have been put to trial and resolved,  
23 does that in any way preclude you from trying to raise it in  
24 the future?

25 MR. BUNSOW: No, I don't believe it does because the

1 unjust enrichment claim is based on the benefit to Apple of  
2 representing itself to be authorized and standard compliant,  
3 and that really is a much more pervasive representation that  
4 goes to the portfolio claim. It's -- it's -- it's much more  
5 based in the portfolio claim as -- rather than individual  
6 patents, per se. So that's one significant difference --

7 THE COURT: Tell me --

8 MR. BUNSOW: -- but the --

9 THE COURT: Tell me, again, how the portfolio claim --  
10 the entire portfolio should be thought about by the Court  
11 differently than the five that have been tried. Tell me why if  
12 there are 1,200 in the portfolio, why it's not 1,200 widgets  
13 and five widgets have already been taken out of the box and  
14 dealt with, and the same thing will happen to the other 1,195  
15 widgets that are left in the box. Tell me why part and parcel  
16 of being the portfolio makes that different than the five  
17 claims that have been to trial.

18 MR. BUNSOW: Well, there's -- first of all, there's  
19 been no determination vis-a-vis actual infringement of the  
20 1,200 claims.

21 THE COURT: Granted. They were stayed. I understand  
22 that.

23 MR. BUNSOW: Okay. All right. And the other thing is  
24 that the 1,200 claims in the context of IPR dec -- declarations  
25 to ETSI is far different than a -- an IPR declaration under

1 five claims. And what -- what we're saying is that the  
2 obligation would be far different. The -- not only the  
3 magnitude of the obligation, but the -- the fact of that  
4 obligation would be far different.

5 We've never been able to do any discovery on Apple's  
6 approach to a portfolio of 1,200 patents and whether or not  
7 they believe they had a contractual obligation. It's -- it's a  
8 difference in magnitude, but it's also a difference in fact.

9 THE COURT: All right. Anything else?

10 MR. BUNSOW: Nothing else, Your Honor.

11 THE COURT: All right. Let's go on to Apple --  
12 Apple's motion for attorney's fees and bill of cost. And I  
13 assume this is under 285?

14 MR. MUELLER: Yes.

15 THE COURT: All right.

16 MR. MUELLER: Thank you, Your Honor.

17 And on our motion for fees and costs, as we've  
18 articulated in the papers, we believe under the Octane  
19 standard, we meet the standard, both as a matter of the  
20 substantive strength of the case and also the manner in which  
21 it was litigated.

22 The Supreme Court's test asked us to look at both what  
23 happened, the outcome in the case, and how we arrived at that  
24 outcome. And we think taking both of those criteria in the  
25 balance, we meet the standard for fees.

1           In terms of what happened, this is a case in which 14  
2 patents were asserted, and not just for brief periods of time,  
3 but 14 patents for long periods of time over the course of the  
4 last three years. Over 170 claims were asserted in those 14  
5 patents, and Core Wireless prevailed on -- on none of them,  
6 subject to Your Honor's review today.

7           We're not aware of a case in which that many claims  
8 have been asserted -- that many patents have been asserted with  
9 zero being found to be infringed and valid. So the magnitude  
10 of the outcome in the case alone demonstrates that this is a --  
11 an exceptional case that is set apart from others in the words  
12 of the Supreme Court.

13           That's also true with respect to these contract  
14 claims, as we already discussed in the last -- in the context  
15 of the last motion.

16           A theory was advanced of a breach of contract for  
17 which no contract existed, and we believe that also is properly  
18 considered as part of the outcome of the case.

19           In terms of how we arrived at this outcome, as our  
20 papers articulated, over the course of the last three years,  
21 we've had to deal with moving target allegations on a series of  
22 different issues. And you don't have to take my word for it,  
23 there's been rulings on these issues.

24           So, for example, a Daubert ruling that struck a  
25 damages theory that then was submitted again in a supplemental

1 report which Judge Love struck on the ground that it was an  
2 attempt to redo a theory that he had precluded.

3 Judge Love also struck a Doctrine of Equivalents  
4 argument that was made without any preservation of Doctrine of  
5 Equivalents being made previously.

6 We had an instance where a new expert opinion was  
7 offered at 7:00 p.m. on the night of a deposition on redirect  
8 testimony from Plaintiff's counsel after the expert had  
9 admitted an error earlier in the day. We had a report being  
10 served to us on Day 3 of an expert deposition -- a supplemental  
11 expert report being submitted on Day 3.

12 THE COURT: What kind of sanctions did Judge Love  
13 impose at these various steps along the way?

14 MR. MUELLER: The sanction for what I just described,  
15 Your Honor, was to strike the report; to strike the technical  
16 DOE opinion, the Doctrine of Equivalents opinion; to strike the  
17 damages report. There were no other sanctions imposed, but  
18 there was a -- a strike of the relevant expert testimony.

19 THE COURT: But nothing declared by the Court to be a  
20 sanction per se attributable to the tenor of the conduct you're  
21 now highlighting for me?

22 MR. MUELLER: Correct. That's correct, Your Honor.  
23 That's correct.

24 As we've also noted in our brief, Your Honor, there  
25 was the violation of Your Honor's motion in limine rulings at

1 trial. And I won't belabor some of the other issues that we've  
2 laid out, but we do think that some of the accusations that  
3 have been made don't rise to the level of professionalism that  
4 we all try to meet.

5           So we think if you put it all in the balance, the how  
6 the case was litigated prong also supports a determination of  
7 fees taken along with the outcome in the case, and -- that for  
8 both of those reasons, what happened in terms of the number of  
9 patents that were found to be non-infringed, the 170-plus  
10 claims found not infringed, as well as the conduct the  
11 litigation would serve to increase the fees and the burden on  
12 the parties and the Court.

13           THE COURT: Let me ask you this, Mr. Mueller. Under  
14 your reading of the Supreme Court's opinion in Octane Fitness  
15 and your reading of the Apple statute under Section 285, is it  
16 an all or nothing proposition for the Court, or does the Court  
17 have the latitude and discretion to award fees at something  
18 less than a hundred percent?

19           MR. MUELLER: I believe Your Honor does have the  
20 discretion to do that and -- and could in Your Honor's  
21 discretion decide to award something less than what we have  
22 requested.

23           THE COURT: And if the Court granted your request and  
24 shifted fees to the Plaintiff, unless the Court, exercising its  
25 discretion reduced that, what would a hundred percent of the

1 fees be in this case in a dollars and cents figure?

2 MR. MUELLER: We've submitted, I believe, under seal  
3 the -- the answer to that question. I -- with my -- may I  
4 confer with my client briefly, Your Honor, just to --

5 THE COURT: I mean, we're talking about millions of  
6 dollars, right?

7 MR. MUELLER: The answer is yes, Your Honor. The  
8 number that we've submitted for Your Honor for the three years  
9 of litigation is approximately \$10 million. That, I would  
10 note, Your Honor, is less than the actual fees incurred. And  
11 we've made an effort to cut back in two respects. One we've  
12 been very, very careful to exclude fees attributable to patents  
13 that were dropped that we promised not to seek fees for as part  
14 of a stipulation with Core Wireless.

15 Second, we've also tried to be conservative in our  
16 request and have accordingly limited the request to the time  
17 keepers that spent the most time on the case, not all of them.

18 I will note, Your Honor, that at trial, there was  
19 testimony from Core Wireless that they had spent substantially  
20 in excess of that figure. And so I think imbued in the context  
21 of that evidence, it -- it's further corroborating its  
22 reasonableness.

23 THE COURT: Let me ask you this, Mr. Mueller. Last  
24 week, interestingly enough, I heard argument on post-trial  
25 motions in another case involving your client, not represented

1 by your firm, nor any of the counsel at counsel table present.  
2 But there, the jury returned a verdict -- a sizeable verdict in  
3 favor of the Plaintiff, and the Plaintiff stood where you are  
4 today asking me to declare that that was an exceptional case  
5 and to order Apple to pay the fees of the Plaintiff which were  
6 also several million dollars.

7 Apple argued, I think, fairly eloquently that  
8 exceptional is exceptional, and it's not the every day push and  
9 shove of litigation that results in a winner and a loser, but  
10 it's got to be beyond that, and it is, to quote the Supreme  
11 Court, truly rare.

12 Were they wrong there given that to the casual  
13 observer the overall -- the overall scope and tenor of the two  
14 trials is not that different? Certainly there are differences,  
15 but in a -- from a high level view, they were two well fought,  
16 hard fought cases that came down with completely opposite  
17 results. But why is -- why is Apple right here, but they're  
18 not right there or vice versa?

19 MR. MUELLER: Absolutely, Your Honor. Two points.  
20 First, it absolutely is a high standard, and I think that it  
21 was appropriate for counsel to say that last week, and I'm not  
22 saying anything different today. It is a high bar to meet. It  
23 is the unusual case, but we do think this is the unusual case.  
24 And this -- it was not a case in which one or two or three  
25 patents were asserted and there was a loss on those. It's 14



1 patents asserted for a period of years.

2           Moreover, we believe we demonstrated much earlier than  
3 trial that there were problems and deficiencies with those  
4 patents that required them to be dropped, yet the case  
5 continued and the fees continued to run. And we think that if  
6 you take a magnitude -- that number of patents, 170 plus  
7 claims, and continue to litigate them for years in the face of  
8 substantive deficiencies that were laid out in our discovery  
9 responses and our invalidity contentions, that at the  
10 conclusion of that case, there needs to be a -- a consequence  
11 for continuing to litigate at that level of volume of patents.

12           It's -- we're not aware of any case in which this many  
13 patents and this many claims resulted in nothing, resulted in  
14 zero claims found infringed and valid. So we do very much  
15 agree, it's a high bar, it's a high standard. But this is the  
16 unusual case that meets that standard because of the outcome of  
17 the case and the way in which it was litigated.

18           THE COURT: You're not telling me that it's unusual in  
19 patent litigation for there to be an early assertion of patents  
20 that through the discovery process are shown not to be  
21 applicable and drop out along the way so that you go to trial  
22 on a fewer number than the initial assertions represented?

23           MR. MUELLER: Not at all. Not the all. That's  
24 obviously very common.

25           What is unusual, Your Honor, is to have this number of

1 patents go all the way through without any claims being found  
2 infringed and valid. It's also unusual to see this level of  
3 moving target allegations throughout the course of the case  
4 which we think was attributable to the weakness of the  
5 assertions in the first instance.

6 And not all of these were a function of discovery,  
7 revealing that the facts weren't there. As Your Honor saw at  
8 trial, the premise of the case was that the patents cover the  
9 standard which are public documents. And although there is  
10 certainly a question as to whether the standard sections at  
11 issue were implemented in the Apple products and the chips  
12 supplied by Qualcomm and Intel, there's also the threshold  
13 question of whether the patents cover the standard at all.

14 And we articulated in discovery responses early in the  
15 case reasons why they didn't, and yet the case continued, the  
16 case continued.

17 THE COURT: All right. Thank you, Mr. Mueller.

18 MR. MUELLER: Thank you, Your Honor.

19 THE COURT: Mr. Bunsow, a response?

20 MR. BUNSOW: Thank you, Your Honor.

21 I'd like to use my slides in responding to this one,  
22 so if I can have a moment bring them up?

23 THE COURT: Certainly.

24 MR. BUNSOW: So the -- the seminal case in this  
25 district so far on post-Octane Fitness is Judge Dyk's decision

1 in August of 2014, Stragent versus Intel Corporation. And  
2 Judge Dyk makes several observations and sets the standards for  
3 considering attorney's fees motions.

4 First, awards of attorney's fees in patent cases  
5 should be reserved for rare and unusual circumstances. It  
6 seems we all agree on that.

7 Second, consider the totality of the circumstances.  
8 No kitchen sink approach. I believe the litany that you just  
9 heard is exactly that, simply a kitchen sink approach of  
10 complaints.

11 Third, mere losing is not a relevant consideration.  
12 The fact that we did not win on any of the asserted patents or  
13 asserted claims is not a relevant consideration.

14 Fourth, independently sanctionable conduct is not  
15 enough. And let me digress here and say that I was very  
16 chagrined by the sanctions that we received at trial. I'm  
17 going to talk about that in a few minutes. It had a dramatic  
18 impact on the case. And I just want to assure you we have  
19 other trials coming up that I have personally taken action that  
20 will ensure that that does not happen again. But we were  
21 sanctioned for that, and -- and it hurt us substantially.

22 And Judge Dyk observes in the fifth consideration  
23 individual actions or arguments such as those that merit  
24 sanctions should not be addressed by a Section 285 finding. It  
25 is the case as a whole. And, of course, the reason is it would

1 be duplicate punishment.

2 Sixth, conduct of the winning party is relevant.  
3 Awarding fees is a matter of equitable discretion. And I'm  
4 going to be talking about some of Apple's actions in this case,  
5 starting with the very beginning of the case. And I believe  
6 they fully explain why this case wasn't reduced quicker in the  
7 context of the case as it approached.

8 So Apple's arguments are really a kitchen sink  
9 approach. They've come up with a dozen or so complaints about  
10 how the case was litigated. In fact, the case was litigated in  
11 a collegial and cooperative manner.

12 We had two motions to compel that we brought in this  
13 case over three years, two motions to compel. And our first  
14 motion to compel was granted because Apple refused to make  
15 production of documents. And that motion to compel was  
16 granted.

17 The second one that they complain about resulted as a  
18 result of the PA Consulting reports. That was the only matter  
19 that we were not able to come to agreement on between counsel.  
20 I mean, Mr. Mueller and I talked frequently in this case, and I  
21 think he would agree that on almost every situation, we were  
22 able to come to agreement in a collegial and cooperative  
23 manner. That's the way I litigate. That's the way this case  
24 was litigated.

25 PA Consulting reports was different. A, because they

1 were hidden, and, B, because we found out about them very late  
2 in the process, and they initially refused to produce them.  
3 They claim PA Consulting did not want them to produce and that  
4 they were confidential. We contacted PA Consulting. They said  
5 no such thing. We got permission from PA Consulting. Apple  
6 still refused to produce them. That's when we brought our  
7 motion to compel. Before the motion to compel, they did  
8 produce them, which mooted the motion. It was as simple as  
9 that.

10 But let me talk about the history of this case and how  
11 it began. Core Wireless conducted an extensive analysis of the  
12 asserted patents in this case looking at the publicly available  
13 standards that Apple says it uses.

14 We filed the biggest complaint that I have not only  
15 personally produced but ever seen. We had over 1,200 specific  
16 paragraphs asserting standards that we claimed Apple used in  
17 their products. And we asked Apple at the outset, if you do  
18 not use these standards sections, tell us, and -- and we'll  
19 take that into consideration going forward.

20 What did they do? Incredibly, they said that they  
21 lacked sufficient information and belief to admit or deny  
22 whether they used those standard sections. 1,200 paragraphs of  
23 standard sections. That's the response that we got.

24 They didn't admit a single standard specification as  
25 being in their products. They denied that they knew how

1 they -- the most important products in their history worked.

2 Core Wireless spent almost a million dollars on expert  
3 source code analysis because Apple would not admit compliance  
4 with the standard. It's as simple as that.

5 That was how this began. From the beginning, Apple  
6 wanted Core Wireless to reduce the number of patents and the  
7 number of claims. And we said we would do that at the  
8 appropriate time. There was never a refusal to do that. We  
9 knew you couldn't try 14 patents realistically in a case like  
10 this, but we needed to know the information, the information  
11 that Apple had refused to give us, the admissions that they had  
12 refused to make.

13 They brought a motion early on in front of Judge Love  
14 to force a reduction, and Judge Love agreed with us and said  
15 that while it might be appropriate later on to reduce the  
16 number of patents, the number of claims, it was premature.

17 We followed the normal practice in this court and  
18 other courts. After we had had sufficient discovery, after we  
19 had had an opportunity, after we had spent hundreds of  
20 thousands of dollars analyzing source code that we shouldn't  
21 have had to analyze, we offered Apple first a dismissal of some  
22 of the claims without prejudice. That was accepted. Those --  
23 those patents can still be asserted today.

24 And in a second round, we offered a dismissal with  
25 prejudice as to certain other claims. And as part of that

1 dismissal, Apple agreed not to seek fees or costs as to the  
2 dismissed patents.

3           Now, I think it's a little bit disingenuous to stand  
4 up now and say the -- the process of reducing patents and  
5 reducing claims should be a basis for awarding attorney's fees  
6 in this case when they agreed at the time we stipulated to  
7 dismiss those claims that they would not be the subject of  
8 attorney's fees. Their contention is that they have carved out  
9 fees for those particular patents, but nonetheless the fact of  
10 the dismissals should support, I guess, attorney's fees for  
11 others.

12           I think the stipulation is clear, and they shouldn't  
13 be able to be heard today that dismissal of patents along the  
14 way in the orderly course of litigation very similar to the  
15 local rules that are in place in this court now, as a matter of  
16 fact, makes us subject to paying attorney's fees and makes this  
17 an exceptional case.

18           Apple resisted discovery from the beginning. We filed  
19 a motion to compel which was granted during discovery. As I  
20 said, we've had the PA Consulting report. We tried through  
21 numerous meet and confer sessions to resolve that issue, and  
22 only brought it to the Court when we were unable to do that.

23           I would submit that the kitchen sink approach here  
24 doesn't make this case exceptional. Two motions to compel, one  
25 of which was granted, is not an exceptional situation for a

1 case that lasted over three years. Reducing the number of  
2 patents happens in most cases these days. Asserting evolving  
3 theories is -- is not except -- exceptional.

4 Let's take their complaint about the damages theories  
5 in this case. As the Court knows, the damage theories in  
6 patent cases has been evolving over the last several years and  
7 is still evolving today.

8 Apple's own expert had three damage theories and  
9 presented one at trial. That's not unusual. We're not  
10 complaining about that.

11 There's nothing about this case that makes it  
12 exceptional. There is no suggestion that during this  
13 litigation, Core Wireless hid any evidence. We didn't.  
14 There's no suggestion that we destroyed evidence. We didn't.  
15 There's no suggestion that we sequestered witnesses. We  
16 didn't. In fact, we cooperated in making witnesses available.

17 There's no argument that perjury was committed.  
18 There's no argument that we frustrated discovery with improper  
19 tactics or otherwise acted improperly. There's simply no basis  
20 to take this case out of the realm and make it an exceptional  
21 case.

22 And as for the sanctions at trial, interpreting 285 to  
23 provide a duplicate remedy for conduct that is already  
24 sanctionable would render these other sources of fee shifting  
25 superfluous. That's what Judge Dyk case said in the Stragent



1 case.

2 We were hurt by the sanction that the Court assessed  
3 against us at trial. We lost our opportunity to bring a  
4 rebuttal case. And what did Apple say? Apple told the jury  
5 that we did not bring a rebuttal case because our case was so  
6 weak that we couldn't bring a rebuttal case. That was in  
7 closing argument.

8 Now, I'm not going to stand up and say that's wrong,  
9 we didn't bring a rebuttal case because we got sanctioned. But  
10 the fact of the matter is, not only were we injured, but Apple  
11 exploited that injury, I think, in an improper way.

12 To award attorney's fees here and find this an  
13 exceptional case would be a duplicate remedy. And we believe  
14 we acted appropriately in this case from filing to verdict, an  
15 unfortunate verdict in our view, but we think the case had  
16 substantial merit, which is reflected at least in our  
17 post-trial motions. And we would ask the Court to deny the  
18 request for fees in this case.

19 On the question of costs, we agree that Apple should  
20 be entitled to some costs. The question is how much. The  
21 focus of the dispute is real -- and I think this is premature  
22 because judgment hasn't really been entered yet. I don't think  
23 the time for contesting the cost bill has come, but --

24 THE COURT: Well, maybe not on a specific basis, but  
25 on a high level basis, I think the Court would benefit by

1 hearing the parties' positions.

2 MR. BUNSOW: That's great. So the -- the thing that  
3 we object to is \$300,000.00 in costs attributable to graphics  
4 presentation -- or preparation, I'm sorry. We're not objecting  
5 to a technician in the courtroom making those presentations.  
6 What we're objecting to is the bill from a company called  
7 Fulcrum that is a company that makes PowerPoint slides and the  
8 art work that went along with that. We don't think that that's  
9 allowed by statute. We think the law is pretty clear on that.

10 Other than that, I believe Mr. Mueller would confirm  
11 that we have agreement on the other matters.

12 THE COURT: All right. Thank you, Mr. Bunsow.

13 MR. BUNSOW: Thank you.

14 THE COURT: Anything else, Mr. Mueller?

15 MR. MUELLER: Briefly, Your Honor.

16 THE COURT: Proceed.

17 MR. MUELLER: Thank you, Your Honor.

18 Just a few final points. First, to start at the  
19 beginning of the case for just a moment, the complaint did  
20 indeed recite specific standards sections, and we didn't say  
21 that -- we did indeed plead that Apple lacked knowledge with  
22 respect to those particular sections. I think the reason why  
23 is clear to Your Honor having seen the trial.

24 The functionality in the Apple products that supports  
25 the standard is from Qualcomm and Intel. And at that stage of

1 the case, there had not been discovery into the Qualcomm and  
2 Intel chips. As discovery unfolded, both sides did analysis of  
3 their source code, the Qualcomm and Intel code, and that was  
4 a -- that was a -- a process that was required to see what  
5 portions of the standard were being implemented in the  
6 products.

7           Second, the issue is not dropping patents. We're not  
8 arguing that we're entitled to fees because they dropped  
9 patents. In fact, in some ways dropping patents earlier would  
10 have been a better thing.

11           Our point is that of the 14 patents that were asserted  
12 in the case, the problems were clear from an early stage and  
13 not just because of code issues but the threshold question of  
14 whether the patents covered the standard itself. We believe it  
15 was clear that they did not from an early stage in the case.  
16 And that as a consequence of that, the -- the better course  
17 to save all sides expenses would have been to drop patents  
18 sooner.

19           So we're not criticizing Core Wireless for dropping  
20 patents. It's, in fact, the opposite, that they persisted with  
21 claims long after the weaknesses in those claims were apparent.

22           Third, one distinguishing characteristic of this case,  
23 as we laid it out in the briefs, is the shifting theories  
24 throughout the case. And it was not simply a matter of  
25 articulating multiple theories and proceeding on one to trial.

1 The problems were in the vein of not articulating theories in  
2 an expert report, unveiling that theory midway through a  
3 deposition, or unveiling that theory in a supplemental report  
4 served untimely. That's what we meant by shifting theories,  
5 not narrowing theories that had been properly preserved in an  
6 initial report.

7           What we saw were experts making mistakes in their  
8 analysis of the code, for example, and then being asked by  
9 their counsel for effectively new opinions after those problems  
10 had surfaced. And that type of contact -- conduct, we believe,  
11 was unreasonable and drove up the costs from Apple's  
12 perspective. Those shifting theories were an important part of  
13 the conduct that we believe supports our request for fees.

14           And at the end of the day, the outcome of the case is  
15 170 plus claims on the patents and contract claims, as well,  
16 none of which prevailed and all of which we believe were  
17 pursued in ways that we think served to drive up the cost for  
18 Apple.

19           So it's a very high bar. We absolutely concede it is  
20 a high bar for attorney's fees. We think on these facts and  
21 with this outcome, it's met.

22           THE COURT: What's your position on the cost issue,  
23 the -- particularly the 300,000 that Mr. Bunsow mentioned?

24           MR. MUELLER: So on the cost issue, we cited the Eolis  
25 case -- if I'm pronouncing it correctly -- that did endorse the

1 idea of graphics vendors being a proper source of cost. We put  
2 in our submission as to what those costs were. It's up to Your  
3 Honor's discretion as to how much to award us. But we do think  
4 that there's legal precedence supporting graphics being  
5 properly recoverable under the cost statute.

6 THE COURT: All right.

7 MR. MUELLER: Thank you, Your Honor.

8 THE COURT: And just for the record, Mr. Mueller, I  
9 don't fault you at all for taking advantage in closing argument  
10 of an opportunity. I'm quite confident Mr. Bunsow would have  
11 done the same thing if the roles had been reserved.

12 All right. These are all the matters the Court has  
13 before it for argument today. I will take each of them under  
14 submission and give them additional review, considering your  
15 arguments and presentations from today. I'll attempt to get  
16 you a ruling as soon as practical.

17 But for the record, that completes argument on these  
18 matters today. And, counsel, you're excused.

19 COURT SECURITY OFFICER: All rise.

20 (Hearing concluded.)  
21  
22  
23  
24  
25

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/ Shelly Holmes

SHELLY HOLMES, CSR-TCRR

OFFICIAL REPORTER

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Date